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DENNY J. BEROIZ et al., Plaintiffs and Appellants,
v.
TONY WAHL et al., Defendants and Respondents.
No. B138546.
Court of Appeal, Second District, Division 4, California.
Oct. 30, 2000.

SUMMARY

The trial court granted summary judgment for defendants, residents of a condominium complex, in a defamation action arising out of defendants' having initiated a criminal investigation against plaintiffs in connection with a dispute about rights of access to the complex in Mexico where the parties, all Americans, resided. The court found that the absolute privilege for communications made in judicial proceedings (Civ. Code, § 47, subd. (b)) was applicable. (Superior Court of Los Angeles County, No. BC207213, Paul Boland, Judge.)

The Court of Appeal affirmed. The court held that the absolute privilege was applicable to the conduct of the Americans in Mexico. Although foreign judicial systems differ from California's judicial system, applying the privilege to proceedings and communications in foreign countries tends to promote the policies underlying the privilege. Generally, the absolute privilege shields testimony or statements to officials conducting criminal investigations, and to communications that initiate or prompt criminal investigations. However, the privilege extends only to police reports that may trigger proceedings governed by adequate procedural safeguards. Absent such safeguards, only reports made in good faith, and without malice, merit protection as privileged. Because plaintiffs failed to raise a triable issue that the investigation lacked proper procedural safeguards, the absolute privilege applied. (Opinion by Curry, J., with Vogel (C. S.), P. J., and Hastings, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Summary Judgment § 26--Appellate Review--Scope.
Summary judgment is subject to de novo review. Generally, review of a summary judgment motion by an appellate court involves application of the same three-step process required of the trial court. The three steps are (1) identifying the issues framed by the pleadings, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact.

(2) Summary Judgment § 11--Affidavits--Sufficiency--Defendant.
A defendant moving for summary judgment has the burden of negating a necessary element of the plaintiff's case and demonstrating that under no hypothesis is there a material issue of fact that requires the process of a trial. To do that, the defendant may rely either on affirmative evidence or discovery responses of the plaintiff showing the absence of evidence necessary to establish at least one essential element of the plaintiff's case. Once the defendant carries this substantive burden, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to the plaintiff's case. Any doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment.

EXHIBIT 2

(3) Libel and Slander § 18--Privileged Communications--Absolute Privilege-- Judicial Proceedings.
Privilege is an affirmative defense to a claim of defamation. The absolute privilege in Civ. Code, § 47, subd. (b), provides broad protection to participants in litigation and other official proceedings. Generally, this privilege applies to any communication (1) made in judicial or quasi-judicial proceedings, (2) by litigants or other participants authorized by law, (3) to achieve the objects of the litigation, and (4) that have some connection or logical relation to the action. The absolute privilege promotes several goals, including ensuring free access to the courts, promoting complete and truthful testimony, encouraging zealous advocacy, giving finality to judgments, and avoiding unending litigation. Accordingly, the only exception to its application to tort suits has been for malicious prosecution actions.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 489, 519.]

(4) Libel and Slander § 22--Privileged Communications--Qualified Privilege.
The qualified privilege in Civ. Code, § 47, subd. (c), protects communications made without malice to protect a recognized interest. This privilege applies to any communication, without malice, to a person interested therein, (1) by one who is interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information. This privilege protects good faith, well-intentioned communications serving significant interests.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, §§ 519-530.]

(5) Libel and Slander § 18--Privileged Communications--Absolute Privilege-- Judicial Proceedings--Conduct in Mexico.
The absolute privilege for communications made in judicial proceedings (Civ. Code, § 47, subd. (b)) was applicable to conduct of Americans in Mexico involved in a dispute concerning the condominium complex in which they resided. Although foreign judicial systems differ from California's judicial system, applying the privilege to proceedings and communications in foreign countries tends to promote the policies underlying the privilege. Generally, a foreign judgment will be res judicata in an American court if it has that effect in its country of rendition, and if it meets the American standard of fair trial before a court of competent jurisdiction. Thus, applying the absolute privilege to fair judicial proceedings in foreign countries encourages American citizens in these countries to resolve disputes in the courtroom, rather than by self-help, promotes the finality of judgment, and limits derivative tort litigation in California courts. Furthermore, applying the qualified privilege to American citizens in foreign countries protects their good faith communications regarding their legitimate interests.

[See 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 299.]

(6) Libel and Slander § 18--Privileged Communications--Absolute Privilege-- Judicial Proceedings--Conduct in Mexico--Initiation of Criminal Investigation of Alleged Dispossession.
The trial court properly granted summary judgment for defendants in a defamation action arising out of defendants' having initiated a criminal investigation against plaintiffs in connection with a dispute about rights of access to a condominium complex in Mexico where the parties, all Americans, resided. Generally, the absolute privilege of Civ. Code, § 47, subd. (b) (applicable to conduct in foreign countries), shields testimony or statements to officials conducting criminal investigations and to communications that initiate or prompt criminal investigations. However, the privilege extends only to police reports that may trigger proceedings governed by adequate procedural safeguards. Absent such safeguards, only reports made in good faith, and without malice, merit protection as privileged. Because plaintiffs failed to raise a triable issue that the investigation lacked proper procedural safeguards, the absolute privilege applied. The fact that Mexico's judicial system is not subject to the provisions of the United States and California Constitutions, taken by itself, was insufficient to show that persons charged with dispossession are denied adequate procedural protections.

[See 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 533A.]

(7) Libel and Slander § 3--Elements of Defamation--Republication.
In some cases, the originator of a statement may be liable for defamation when the person defamed republishes the statement, provided that the originator has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person after he or she has read it or been informed of its contents. However, this rule has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them. Moreover, the originator of the statement must foresee the likelihood of compelled republication when the statement is originally made.

COUNSEL

Daar & Newman and Samuel T. Rees for Plaintiffs and Appellants.

Alder & Ring and Bart I. Ring for Defendants and Respondents Tony Wahl and Therese Marian.

Law Offices of Craig D. Weinstein and Craig D. Weinstein for Defendant and Respondent Elena Gladys Alamo Janine.

CURRY, J.
In a defamation action by appellants Denny J. Beroiz, Robert Delmer, and Samuel T. Rees, the trial court granted motions for summary judgment by defendants and respondents Elena Gladys Alamo Janine, Therese Marian, and Tony Wahl. We affirm.

Relevant Factual and Procedural Background

On July 17, 1997, appellants filed their complaint against respondents, as well as Charlotte Boddeker, George Boddeker, Barbara Smith, Eugene ***489** Smith, and Shirley Tate. The complaint alleges the following facts: Appellants, and defendants, including respondents, were residents of a condominium complex in Mexico named "Condominio Las Gaviotas." Appellants were members of the homeowners association, and from March 1991 to March 1996, they served for periods on a vigilance committee that oversees the complex's professional administrator. During this period, defendants, including respondents, violated the homeowners association's rules, requiring action by appellants as members of the vigilance committee. In response, defendants entered into a conspiracy to defame appellants. Respondents made defamatory criminal accusations against appellants, the most recent of which was filed in 1997. Furthermore, defendants, including respondents, encouraged a Mexican national to file a false and defamatory claim against the condominium complex, and in 1997, they published defamatory letters signed by the Boddekers, the Smiths, and Tate, to members of the homeowners association.

Appellants settled their claims against all defendants except respondents. On or about September 10, 1999, respondents filed motions for summary judgment or adjudication, contending, inter alia, that they had not conspired to defame appellants, and that their conduct was privileged under Civil Code section 47.

On summary judgment, Alamo FN1 submitted evidence that appellants had abandoned their allegations of defamatory conduct against her, except for the allegation that she had filed defamatory criminal accusations, assisted by Wahl and Marian. Regarding this allegation, Alamo contended that her conduct was nondefamatory and privileged.

FN1 Although appellants' complaint identifies Alamo as "Elena Gladys Alamo Janine, aka Elena Gladys Alamo," the parties consistently refer to her as "Alamo." We therefore adopt this usage.

Alamo submitted evidence supporting the following version of the pertinent events: Delmer, Beroiz, and Rees were not on the vigilance committee after March 1996. Subsequently, the complex's administrator denied Alamo gas and gardening services, and she was denied entry to the complex because the administrator, upon the vigilance committee's instructions, refused to issue a sticker to her identifying her as a resident. Alamo consulted with a Mexican attorney, who advised her that she had a sufficient basis for alleging the crime of dispossession under Mexican law, and she filed a complaint with the local district attorney's office on August 7, 1996. Alamo did not discuss the making of this complaint with Wahl and Marian, and she did not know the members of the vigilance committee when she made it. The complaint itself states that the administrator, in conjunction with unnamed ***490** members of the complex's board of directors, had dispossessed her by denying services and access to her residence.

Alamo also joined in the motions filed by Wahl and Marian. These motions, which are substantially identical, denied that Wahl and Marian had engaged in any of the conduct alleged in appellants' complaint, with the exception of Alamo's complaint to the local district attorney's office. Regarding Alamo's complaint, Wahl and Marian contended that they had done nothing more than provide testimony upon the orders of the local district attorney, and that this conduct was privileged.

In support of these contentions, Wahl and Marian submitted evidence that they had no involvement with the letters signed by the Boddekers, the Smiths, and Tate, that they were wholly unaware of a false claim by a Mexican national against the complex, and that they had never filed any criminal accusations against appellants. Furthermore, they submitted evidence that Alamo did not ask them to testify, and that the local district attorney made the decision to have them testify.

In response, appellants conceded that their claims against respondents did not rest on the letters signed by the other defendants, and they otherwise focused their opposition on the allegations regarding Alamo's criminal accusations. They contended, inter alia, that the pertinent privileges under Civil Code section 47 do not shield conduct in Mexico. Alternatively, appellants argued that there was evidence that malice had motivated respondents' conduct, thus taking it outside the only applicable privilege.

Appellants submitted a declaration from Rees, an attorney, who stated that the condominium complex is located in an area of Mexico in which direct foreign ownership of real property is prohibited. As a result, American residents of the complex generally hold their property as beneficiaries of a master trust, which is the owner of record. None of the parties to appellants' action are Mexican nationals or directly own their property. Rees, along with the other appellants, had served on the vigilance committee for periods between March 1991 to March 1996. This committee's principal function is to oversee the complex's professional administrator, who is elected annually by the complex's members.

Rees's declaration states that while he served on the vigilance committee, it responded to misconduct by Alamo, Wahl, and Marian. Alamo is not a beneficiary of the trust. Because she has refused to pay overdue fees to the homeowners association and she has built a home without approval, the trustee refuses to transfer a beneficial interest to her. In 1994, the vigilance ***491** committee took legal action to secure demolition of her home. In the same year, the vigilance committee discharged then administrator Roberto Mendoza, who is respondents' friend. Wahl and Marian, along with others, seized the homeowners association's office by force and held it for several months.

Rees's declaration further states that, as a result of these incidents, Alamo, Wahl, and Marian developed animosity towards appellants. In 1995, Alamo filed a dispossession complaint against appellants, but the charges were dismissed because she lacked supporting witnesses. After Alamo filed her complaint on August 7, 1996, Wahl and Marian voluntarily appeared and gave testimony. On August 14, 1996, the local district attorney determined that there was insufficient evidence to support any further investigation. Later, during discovery in the present action, Alamo admitted to Rees that she had "enlisted the aid of Marian and Wahl in supporting her criminal charges," and respondents were unable to produce written orders to Marian and Wahl to appear before the local district attorney.

Following a hearing, the trial court granted the motions, concluding that respondents' conduct was subject to the absolute privilege under Civil Code section 47. Judgment was filed on November 8, 1999.

Discussion

Appellants contend that the trial court erred in granting summary judgment. We disagree.

A. *Summary Judgment*

(1) Summary judgment is subject to de novo review. (*Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1116 [78 Cal.Rptr.2d 478].) Generally " '[r]eview of a summary judgment motion by an

appellate court involves application of the same three-step process required of the trial court. [Citation.]' " (Bostrom v. County of San Bernardino (1995) 35 Cal.App.4th 1654, 1662 [42 Cal.Rptr.2d 669].) The three steps are (1) identifying the issues framed by the pleadings, (2) determining whether the moving party has made an adequate showing that negates the opponent's claim, and (3) determining whether the opposing party has raised a triable issue of fact. (*Ibid.*)

(2) These steps reflect a series of burden shifts. A defendant moving for summary judgment has the burden of "negat[ing] a necessary element of the plaintiff's case, and demonstrat[ing] that under no hypothesis is there a ***492** material issue of fact that requires the process of a trial. [Citation.]" (*Molko v. Holy Spirit Assn.* (1988) 46 Cal.3d 1092, 1107 [252 Cal.Rptr. 122, 762 P.2d 46].) To do that, the defendant may rely either on affirmative evidence or discovery responses of the plaintiff showing the absence of evidence necessary to establish at least one essential element of the plaintiff's case. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 589-590 [37 Cal.Rptr.2d 653].) Once the defendant carries this substantive burden, the burden shifts back to the plaintiff to show that a triable issue of one or more material facts exists as to the plaintiff's case. (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562 [42 Cal.Rptr.2d 697].) Any doubts as to whether there are any triable issues of fact are to be resolved in favor of the party opposing summary judgment. (*Ibid.*)

B. *Privilege*

The key issues presented here concern the application of the absolute and qualified privileges in Civil Code section 47 to respondents' conduct in connection with Alamo's complaints of dispossession. FN2

FN2 All further statutory citations are to the Civil Code, unless otherwise indicated.

(3) Privilege is an affirmative defense to a claim of defamation. (5 Witkin, Summary of Cal. Law (9th ed. 1988 & 2000 supp.) Torts, §§ 498, 519.) The so-called absolute privilege in subdivision (b) of section 47 provides broad protection to participants in litigation and other official proceedings. FN3 (5 Witkin, Summary of Cal. Law, *supra*, §§ 498-517.) Generally, this privilege "applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 [266 Cal.Rptr. 638, 786 P.2d 365].)

FN3 Section 47, subdivision (b) provides that "[a] privileged publication or broadcast is one made: [¶] ... [¶] (b) In any ... (2) judicial proceeding, (3) in any other official proceeding authorized by law ...."

As our Supreme Court explained in *Silberg v. Anderson*, *supra*, 50 Cal.3d 205, the absolute privilege promotes several goals important to our system of justice, including "ensuring free access to the courts, promoting complete and truthful testimony, encouraging zealous advocacy, giving finality to judgments, and avoiding unending litigation," and thus it has been called " 'the backbone to an effective and smoothly operating judicial system.' [Citation.]" (*Id.* at pp. 214, 215, quoting *McClatchy Newspapers, Inc. v. Superior Court* (1987) 189 Cal.App.3d 961, 970 [234 Cal.Rptr. 702].) Accordingly, "[t]he only exception" to its application "to tort suits has been for ***493** malicious prosecution actions. [Citations.]" (*Silberg v. Anderson*, *supra*, at p. 216.)

(4) The so-called qualified privilege in subdivision (c) of section 47 protects communications made without malice to protect a recognized interest. (5 Witkin, Summary of Cal. Law, *supra*, Torts, §§ 519-530.) This privilege applies to any communication, "without malice, to a person interested therein, (1) by one who is interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information." (§ 47, subd. (c).) This privilege protects good faith, well-intended communications serving significant interests. (See Rest.2d Torts, § 603, com. a, pp. 291-292.)

(5) The initial issue before us is whether these privileges, as codified in section 47, apply to conduct in Mexico. FN4 This appears to be a question of first impression. Although there is relatively little case authority

relevant to this question in other jurisdictions within the United States, the cases that we have found have uniformly held that similar privileges apply to foreign proceedings and communications. ***494**

FN4 As a threshold matter, appellants contend that Wahl and Marian could not rely on privilege as a defense on summary judgment because their answers do not assert this defense. However, Wahl and Marian argued in their motions for summary judgment that they could rely on this defense even though their answers had not asserted it. Appellants did not dispute this contention before the trial court, and they addressed Wahl's and Marian's assertion of privilege on its merits. Accordingly, appellants have waived this contention. (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 346, fn. 5 [87 Cal.Rptr.2d 856]; *Jones v. Dutra Construction Co.* (1997) 57 Cal.App.4th 871, 876-877 [67 Cal.Rptr.2d 411].)Appellants also contend that Alamo, unlike Wahl and Marian, failed to obtain the trial court's permission to file her motion for summary judgment within 30 days of the trial date. Appellants contend that this error, which they first raised at the hearing on respondents' motions for summary judgment, is jurisdictional, and requires reversal. We are not persuaded. Code of Civil Procedure section 437c, subdivision (a) provides that a summary judgment motion "shall be heard no later than 30 days before the date of trial, *unless the court for good cause orders otherwise*." (Italics added.) Because the trial court may permit summary judgment motions to be filed within the 30-day limit, and it determined that Wahl and Marian had stated good cause on this matter, we conclude that the trial court would, in all likelihood, have granted Alamo an order allowing her to file her motion if she had requested one. Accordingly, the error here, if any, is not jurisdictional. (Cf. *Jones v. Dutra Construction Co., supra*, 57 Cal.App.4th at pp. 876-877 [contention of procedural error waived because appellants failed to bring error to attention of trial court, which probably would have permitted correction of error].) Furthermore, assuming that the trial court erred in ruling on Alamo's motion for summary judgment in the absence of an order permitting her to file this motion, appellants have failed to show reversible error. Appellants responded fully to Alamo's motion, and they have not suggested that the trial court's error denied them any opportunity to enhance their opposition. Moreover, as we explain below, appellants failed to raise a triable issue regarding Alamo's motion, and thus nothing indicates that they might have prevailed at trial on their claims against Alamo.

In *Vanderkam v. Clarke* (S.D.Tex. 1998) 993 F.Supp. 1031, 1031-1032, the executive director of a scandal-ridden Irish corporation brought an action against a lawyer appointed by the High Court of Ireland to investigate the corporation, alleging that the lawyer's communication of his official findings had defamed the director. The district court in *Vanderkam* held that the lawyer's conduct was absolutely privileged, reasoning that the lawyer had published his findings as ordered by the Irish court, and that under Texas law, lawyers are privileged to publish otherwise defamatory material in connection with a judicial proceeding. (*Id.* at p. 1032.)

Similarly, in *Sorge v. City of New York* (1968) 56 Misc.2d 414, 415 [288 N.Y.S.2d 787, 790-791], two police officers in New York City testified, at the request of the State Department of the United States, at a hearing before an Italian judge regarding criminal activity in Italy. When the officers were sued for defamation, the court in *Sorge* held that their testimony during the Italian judicial proceeding was absolutely privileged under New York law. (288 N.Y.S.2d at pp. 798-799.)

Finally, in *Bakhshandeh v. American Cyanamid Company* (S.D.N.Y. 1962) 211 F.Supp. 803, 804, an Iranian citizen sued an American corporation for defamation, alleging, inter alia, that the corporation's employees had made defamatory remarks to an Iranian governmental official in Tehran. Citing primarily New York law, the district court in *Bakhshandeh* determined that these remarks to the Iranian official were subject to a qualified privilege, and thus they were not actionable absent proof of malice. (*Id.* at pp. 808-809.)

The conclusion that the section 47 privileges may properly shield conduct in Mexico finds additional support in the policies underlying these privileges. Although foreign judicial systems differ from California's judicial system, applying the privileges to proceedings and communications in foreign countries tends to promote these policies. Generally, "[a] foreign judgment will be res judicata in an American court if it has that effect in its country of rendition, and if it meets the American standard of fair trial before a court of competent jurisdiction." (7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 299, p. 846.) Thus, applying the absolute privilege to fair judicial proceedings in foreign countries encourages American citizens in these countries to resolve disputes in the courtroom, rather than by self-help, promotes the finality of judgment, and limits derivative tort litigation in California courts. Furthermore, applying the qualified privilege to American citizens in foreign countries protects their good faith communications regarding their legitimate interests. FN5

FN5 Appellants contend that the absolute privilege should never be applied to foreign proceedings, arguing that the contrary holding would encourage proceedings against American citizens that lack guarantees of fairness. We are not persuaded. As we explain below, evidence that a foreign proceeding is devoid of adequate procedural safeguards may raise a triable issue as to whether communications connected with the proceeding fall within the scope of the absolute privilege, but no such evidence is present here.

(6) The next question presented is the extent to which respondents' conduct falls within the absolute privilege. Generally, the absolute privilege ***495** shields testimony or statements to officials conducting criminal investigations. (*Irwin v. Murphy* (1933) 129 Cal.App. 713, 718-719 [19 P.2d 292] [report of grand jury]; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 392-394 [182 Cal.Rptr. 438] [toxicologist's report and subsequent testimony at preliminary hearing].) However, California courts have split about whether communications that initiate or prompt criminal investigations are subject to the absolute privilege.

The majority of cases that have addressed this issue follow *Williams v. Taylor* (1982) 129 Cal.App.3d 745 [181 Cal.Rptr. 423]. In *Williams*, the president of a car dealership investigated the work of a discharged employee and reported what he believed to be criminal activity to the police. (*Id.* at p. 750.) After a criminal investigation, the employee was charged with several crimes. Some of the charges were dismissed, and the employee was acquitted of the remaining crimes. (*Ibid.*) The court in *Williams* concluded that the absolute privilege shielded the president's report to the police, reasoning that the qualified privilege was inadequate to provide the " 'open channel of communication' " between citizens and police needed for effective investigation of crimes. (*Id.* at pp. 753-754, quoting *King v. Borges* (1972) 28 Cal.App.3d 27, 34 [104 Cal.Rptr. 414].) Subsequently, *Williams* has been followed on similar facts by *Hunsucker v. Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, 1504 [28 Cal.Rptr.2d 722], *Passman v. Torkan* (1995) 34 Cal.App.4th 607, 616-620 [40 Cal.Rptr.2d 291], *Cabesuela v. Browning-Ferris Industries of California, Inc.* (1998) 68 Cal.App.4th 101, 112 [80 Cal.Rptr.2d 60], and *Johnson v. Symantec Corp.* (N.D.Cal. 1999) 58 F.Supp.2d 1107, 1108-1113.

Williams was rejected in *Fenelon v. Superior Court* (1990) 223 Cal.App.3d 1476 [273 Cal.Rptr. 367]. In *Fenelon*, the court concluded that reports of potential criminal activity to the police were subject to the qualified privilege, citing case law from other jurisdictions, and reasoning that *Williams* permitted " 'effective character assassination ....' " (223 Cal.App.3d at p. 1483, quoting *Toker v. Pollak* (1978) 44 N.Y.2d 211, 222 [405 N.Y.S.2d 1, 7, 376 N.E.2d 163, 169].) Subsequently, no reported California case has followed *Fenelon*. FN6 The courts agreeing with *Williams* have found *Fenelon* unpersuasive, concluding that the constitutional and procedural safeguards ***496** governing California's judicial system undermine the concern that applying the absolute privilege to police reports endangers the rights of the reported wrongdoer. (*Hunsucker v. Sunnyvale Hilton Inn*, *supra*, 23 Cal.App.4th at p. 1504; *Johnson v. Symantec Corp.*, *supra*, 58 F.Supp.2d at p. 1113.)

FN6 We recognize that in *Devis v. Bank of America* (1998) 65 Cal.App.4th 1002, 1007-1008 [77 Cal.Rptr.2d 238], the court cited *Williams* and its progeny with approval, but suggested in dicta that false reports to the police are subject only to the qualified privilege, citing primarily *Turner v. Mellon* (1953) 41 Cal.2d 45, 48 [257 P.2d 15], and *Du Lac v. Perma Trans Products, Inc.* (1980) 103 Cal.App.3d 937, 941 [163 Cal.Rptr. 335]. However, these cases, which involve tort claims of false arrest and false imprisonment, predate *Silberg*, in which our Supreme Court indicated the broad scope of the absolute privilege (*Silberg v. Anderson*, *supra*, 50 Cal.3d at p. 216), and thus they are not persuasive on the issue before us.

We believe that *Williams* and its progeny represents the better view on the application of the absolute privilege to police reports made in California. However, as we have observed, the rationale offered in the *Williams* line of cases extends only to police reports that may trigger proceedings governed by adequate procedural safeguards. Absent such safeguards, only reports made in good faith, and without malice, merit protection as privileged. Accordingly, we conclude that on summary judgment, when there is evidence that a particular report of potential criminal activity in a foreign country triggered an investigation lacking adequate procedural safeguards, there is a triable issue of fact as to whether the report is subject to the absolute privilege, rather than the qualified privilege.

Because the record indicates that Alamo's complaints arose out of access to her residence, and that the local district attorney conducted brief investigations before dismissing the complaints, we conclude that the burden shifted to appellants to show that the qualified privilege should be applied to these complaints. FN7 On this matter, Rees states in his declaration that, as the result of the complaints, he became familiar with the Mexican criminal justice system and its law regarding dispossession. He further states that a person convicted of dispossession can be imprisoned for several years. If the district attorney finds that a complaint of dispossession is supported by two witnesses who testify under oath, the district attorney may decide to indict the alleged wrongdoer. Those indicted are subject to immediate arrest, "might well be unable to secure pre-trial release from such custody," and "do not receive the [c]onstitutional protections provided to criminal defendants in the United States."

FN7 On summary judgment, we may review all the evidence submitted by the parties to determine whether the moving parties carried their initial burden. (*Villa v. McFerren* (1995) 35 Cal.App.4th 733, 750-751 [41 Cal.Rptr.2d 719].)

In our view, these vague and conclusory statements do not raise a triable issue about the procedural fairness of the pertinent Mexican proceedings. In California, as in Mexico, a person charged with a felony is subject to immediate arrest, and may encounter difficulties securing pretrial release from custody. Furthermore, that Mexico's judicial system is not subject to the provisions of the United States and California Constitutions, taken by itself, is insufficient to show that persons charged with dispossession are denied adequate procedural protections. ***497**

Because appellants failed to raise a triable issue about the application of the absolute privilege, it is unnecessary for us to assess whether there is evidence that respondents acted with malice in connection with Alamo's complaints. Summary judgment was properly granted on the ground that respondents' conduct regarding these complaints was absolutely privileged.

Appellants disagree, contending that there is sufficient evidence that respondents republished their accusations outside the scope of the privilege. However, their sole evidence of republication is Rees's declaration statement that "[s]ome members [of the condominium complex] claimed to have learned of the charges by statements from [respondents] ...." The trial court properly sustained respondents' hearsay objection to this statement. FN8

FN8 Appellants contend that this hearsay objection was waived because respondents failed to obtain an oral ruling on the objection during the hearing on the summary judgment motions. (Code Civ. Proc., § 437c, subd. (d).) However, the trial court's ruling on this objection is found in the minute order from the hearing, which is the final record of the trial court's rulings at the hearing. (7 Witkin, Cal. Procedure, *supra*, Judgment, §§ 55-57, pp. 584-588.)

Appellants also contend that they were forced to publish respondents' accusations at meetings of members of the condominium complex, and that this publication can support a defamation claim against respondents. We are not persuaded.

(7) In some cases, the originator of a statement may be liable for defamation when the person defamed republishes the statement, provided that the originator "has reason to believe that the person defamed will be under a strong compulsion to disclose the contents of the defamatory statement to a third person *after* he has read it or been informed of its contents. [Citations.]" (*McKinney v. County of Santa Clara* (1980) 110 Cal.App.3d 787, 796 [168 Cal.Rptr. 89].) However, this rule "has been limited to a narrow class of cases, usually where a plaintiff is compelled to republish the statements in aid of disproving them." (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1285 [286 Cal.Rptr. 198].) Moreover, the originator of the statement must foresee the likelihood of compelled republication when the statement is originally made. (*McKinney v. County of Santa Clara*, *supra*, 110 Cal.App.3d at p. 798.)

Here, appellants' contention is supported solely by Rees's terse declaration statement that some members of the condominium complex learned of respondents' accusations "from compelled republication by [appellants] at members' meetings." Nothing in this bald statement indicates that the republication was necessary *in order* to disprove the accusations, and the record otherwise indicates that the local district attorney dismissed the accusations independently of any such republication. Furthermore, nothing in this statement suggests that respondents could foresee that any such republication ***498** would be necessary when they made their statements to the local district attorney. We therefore conclude that appellants failed to raise a triable issue regarding compelled republication. FN9

FN9 Appellants contend for the first time in their reply brief that their defamation claim may be viewed as a claim for malicious prosecution, and as such, it falls outside the scope of the absolute privilege. However, appellants may not raise a factually novel legal theory of liability on appeal. (*United States Golf Assn. v. Arroyo Software Corp.* (1999) 69 Cal.App.4th 607, 623 [81 Cal.Rptr.2d 708]; *City of San Diego v. Rider* (1996) 47 Cal.App.4th 1473, 1492-1493 [55 Cal.Rptr.2d 422].)Finally, during oral argument before us, appellants suggested for the first time that there are triable issues regarding choice of law. This contention is waived by appellants' failure to raise it before the trial court and in their briefs. (*Livingston v. Marie Callenders, Inc.* (1999) 72 Cal.App.4th 830, 834-835 [85 Cal.Rptr.2d 528]; *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6 [76 Cal.Rptr.2d 457].)

In sum, summary judgment was properly granted.

Disposition

The judgment is affirmed.

Vogel (C. S.), P. J., and Hastings, J., concurred.

A petition for a rehearing was denied November 20, 2000, and the opinion was modified to read as printed above. Appellants' petition for review by the Supreme Court was denied January 24, 2001. Kennard, J., was of the opinion that the petition should be granted. ***499**

Cal.App.2.Dist.
DENNY J. BEROIZ et al., Plaintiffs and Appellants, v. TONY WAHL et al., Defendants and Respondents.
84 Cal.App.4th 485, 85 Cal.App.4th 85C, 100 Cal.Rptr.2d 905, 00 Cal. Daily Op. Serv. 8747, 2000 Daily Journal D.A.R. 11,571

Briefs and Other Related Documents (Back to top)

- 2000 WL 34472197 (Appellate Petition, Motion and Filing) Appellants' Petition for Rehearing (Nov. 14, 2000) Original Image of this Document (PDF)
- 2000 WL 34024982 (Appellate Brief) Reply Brief of Appellants (Aug. 22, 2000) Original Image of this Document (PDF)
- 2000 WL 34025664 (Appellate Brief) Appellees Tony Wahl and Theresa Marian's Brief (Jul. 24, 2000) Original Image of this Document (PDF)
- 2000 WL 34025733 (Appellate Brief) Respondent's Brief (Jul. 24, 2000) Original Image of this Document (PDF)
- 2000 WL 34228905 (Appellate Brief) Opening Brief of Appellants (May 24, 2000)
- B138546 (Docket) (Jan. 13, 2000)

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7 Witkin, Cal. Proc. 4th (1997) Judgm, § 299, p. 846

Supplement

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Witkin
California Procedure, Fourth Edition
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Chapter IX. Judgment
XVI. RES JUDICATA
B. Type of Court or Tribunal.

5. [§ 299] Foreign Court.

A foreign judgment will be res judicata in an American court if it has that effect in its country of rendition, and if it meets the American standard of fair trial before a court of competent jurisdiction. (See Rest.2d, Conflict of Laws §98; Rest.3d, Foreign Relations of the United States §481 et seq.; 30 Am.Jur.2d (Rev. ed.), Executions and Enforcement of Judgments §811 et seq.; 9 U.C.L.A. L. Rev. 44; 72 Harv. L. Rev. 573; cf. *Estate of Cleland* (1953) 119 C.A.2d 18, 20, 258 P.2d 1097 [Mexican divorce decree not entitled to recognition where, under Mexican law, it was not final].)

Former C.C.P. 1915 provided for the recognition of "a final judgment of any other tribunal of a foreign country having jurisdiction, according to the laws of such country, to pronounce a judgment." This statute was repealed in 1974 because it had been largely ignored and served no useful purpose. (See Law Rev. Com. Comment.)

The recognition of foreign money judgments is now provided for by the Uniform Foreign Money-Judgments Recognition Act (C.C.P. 1713 et seq.), which sets forth both discretionary and mandatory grounds for withholding recognition. The mandatory grounds are based on failure to meet the Restatement requirement of a fair trial before a court of competent jurisdiction. (See 8 *Cal. Proc.* (4th), *Enforcement of Judgment*, §433.)

****SUPPLEMENT****

7 Witkin, Cal. Proc. 4th (2007 supp.) Judgm, § 299, p. 267

5. [§ 299] Foreign Court.

See 30 Am.Jur.2d (2005 ed.), Executions and Enforcement of Judgments §706 et seq.

Contents Index and Tables

7 WITPROC Ch. IX, § 299

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West's Ann.Cal.C.C.P. § 1716

West's Annotated California Codes Currentness
Code of Civil Procedure (Refs & Annos)
Part 3. Of Special Proceedings of a Civil Nature (Refs & Annos)
Title 11. Sister State and Foreign Money-Judgments (Refs & Annos)
Chapter 2. Foreign-Country Money Judgments (Refs & Annos)

§ 1716. Standards for recognition of foreign-county judgment

(a) Except as otherwise provided in subdivisions (b) and (c), a court of this state shall recognize a foreign-country judgment to which this chapter applies.

(b) A court of this state shall not recognize a foreign-country judgment if any of the following apply:

(1) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law.

(2) The foreign court did not have personal jurisdiction over the defendant.

(3) The foreign court did not have jurisdiction over the subject matter.

(c) A court of this state is not required to recognize a foreign-country judgment if any of the following apply:

(1) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend.

(2) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case.

(3) The judgment or the cause of action or claim for relief on which the judgment is based is repugnant to the public policy of this state or of the United States.

(4) The judgment conflicts with another final and conclusive judgment.

(5) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court.

(6) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

(7) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment.

(8) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.

(d) When the party seeking recognition of a foreign-country judgment has met its burden of establishing recognition of the foreign-country judgment pursuant to subdivision (c) of Section 1715, a party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subdivision (b) or (c) exists.

CREDIT(S)

(Added by Stats.2007, c. 212 (S.B.639), § 2.)

HISTORICAL AND STATUTORY NOTES

2008 Electronic Update

1931 Legislation

Former § 1716, enacted 1872, amended by Code Am.1880, c. 85, p. 106, § 125; Stats.1907, c. 388, p. 727, § 1, relating to trial rules and judgments, was repealed by Stats.1931, c. 281, p. 687, § 1700.

For disposition of former § 1716, enacted in 1872, see Disposition Table preceding Code of Civil Procedure § 1710.10. (If using an electronic publication, see Refs & Annos (References, Annotations, or Tables).)

2007 Legislation

Savings clause, see Historical and Statutory Notes under repeal line for Code of Civil Procedure §§ 1713.1 to 1713.8.

Derivation: Former § 1713.3, added by Stats.1967, c. 503, p. 1847, § 1, amended by Stats.1974, c. 211, p. 409, § 5.

Former § 1713.4, added by Stats.1967, c. 503, p. 1847, § 1.

Uniform Law:

This section is similar to § 4 of the Uniform Foreign-Country Money Judgments Recognition Act. See 13, Pt. II Uniform Laws Annotated, Master Edition or the ULA database on Westlaw.

CROSS REFERENCES

"Foreign judgment" defined for purposes of this Chapter, see Code of Civil Procedure § 1713.1.

LAW REVIEW AND JOURNAL COMMENTARIES

Conclusiveness of judgment rendered in foreign country. (1949) 37 Cal.L.Rev. 38, 45.

Fraudulent use of extradition to serve civil process, status of foreign judgment. (1952) 5 Stan.L.Rev. 129.

Maintenance obligations, international enforcement. Paolo Contini (1953) 41 Cal.L.Rev. 106.

Requirement that full faith and credit be given alimony decree of foreign state. (1930) 3 S.Cal.L.Rev. 208.

NOTES OF DECISIONS

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53 Cal.App. 775, 201 P. 474

GEOFFREY TEIGNMOUTH CLARKSON, as Liquidator, etc., Respondent,
v.
GEORGIANA ESTHER MOIR, Appellant.
GEOFFREY TEIGNMOUTH CLARKSON, as Liquidator, etc., Respondent,
v.
LYDIA M. MOIR, Appellant.
Civ. No. 3685.
Court of Appeal, Second District, Division 1, California.
August 8, 1921.

[1] APPEAL--SUFFICIENCY OF EVIDENCE--ABSENCE OF SPECIFICATIONS OF PARTICULARS.
Where the bill of exceptions presented on appeal from a judgment contains no specifications of particulars wherein the evidence is claimed to be insufficient to justify the findings, the question of the sufficiency of the evidence to sustain the findings cannot be considered by the appellate court.

[2] PLEADING--MISTAKE IN INITIAL OF DEFENDANT--AMENDMENT--TIME.
Where through mistake and inadvertence the middle initial of a party defendant is erroneously inserted in the original complaint, the court may permit the plaintiff to file an amended complaint correcting such error, and the action against that party will be regarded as having been commenced against her at the time when the original complaint was filed.

[3] JURISDICTION--LIQUIDATION OF CANADIAN BANKING CORPORATION--SERVICE OF PROCESS--JUDGMENT.
The rule that jurisdiction to render a judgment personally enforceable against the defendant must be founded upon personal service of process within the state or country to which the jurisdiction of such court is confined is not applicable to proceedings in the supreme court of Ontario, in the Dominion of Canada, conducted under the "Winding-Up Act," and amendments thereto, of that country, for the purpose of liquidating the affairs of a Canadian banking corporation.

APPEAL from a judgment of the Superior Court of Los Angeles County. Frederick W. Houser, Judge. Affirmed.

The facts are stated in the opinion of the court.

***775** Williams & Williams for Appellant.

Donald Barker and Wm. H. Neblett for Respondent.

CONREY, P. J.
Separate actions were brought against appellants and judgments rendered against each of them, from which judgments they have appealed. In accordance ***776** with stipulations of the parties, the appeals are presented on one bill of exceptions and record. Each of the defendants was held liable to pay to the plaintiff, as liquidator of the Sovereign Bank of Canada, an amount equal to the par value of the shares held by her in that bank, a corporation which became insolvent. The recovery was based upon the insolvency of the corporation and resulting proceedings and judgment of the supreme court of Ontario, in the Dominion of Canada, as set forth in the amended complaint. The proceedings in the supreme court of Ontario were conducted under the "Winding-Up Act," and amendment thereto, of the Dominion of Canada. In the judgment rendered in those proceedings, each of the defendants was designated as contributory, and settled upon the list of contributories for a stated amount, and a call was thereby made for the full amount for which the contributory named was settled upon the list of contributories.

The present actions were commenced on the twenty-sixth day of January, 1916. The answers of the defendants, in addition to denials of some of the allegation in the complaints, alleged that the bank became insolvent on or about the eighteenth day of January, 1908, and that the actions were barred by the provisions of section 359 of the Code of Civil Procedure. Under the provisions of that section, an action brought against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the liability was created. In *Royal Trust Co. v. MacBean,* 168 Cal. 642, [144 Pac. 139], which was an action similar to those now under consideration, it was held that "The liability was created, at the latest, upon the beginning of the *status* of insolvency, and the three year period of limitation began to run then."

In the present actions, the court found that all of the allegations of the amended complaint are true; and that the bank did not become insolvent until ninety days after the thirtieth day of June, 1913.

(1) Appellants contend that the corporation, in fact, became insolvent at the time stated in their answers. We must decline to examine the evidence for the purpose of questioning the findings of fact. The bill of exceptions contains no specifications of particulars wherein the evidence is claimed to be insufficient to justify any of the findings. In the absence of such specifications,***777** the question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from the judgment. This rule extends to the review of proceedings on motion for a new trial where the record is brought up by a bill of exceptions. (*Mills v. Brady,* 185 Cal. 317, [196 Pac. 776]; *Beeson v. Schloss,* 183 Cal. 618, [192 Pac. 292]; *Millar v. Millar,* 175 Cal. 799, [Ann. Cas. 1918E, 185, L. R. A. 1918B, 415, 167 Pac. 394].)

(2) On behalf of appellant, Lydia M. Moir, it is claimed that the action against her is barred for the additional reason that the action was originally commenced against another party, and that this appellant was not made a party defendant until May, 1917; also that the court erred in permitting substitution of appellant in place of the original sole defendant in the action. For the reasons hereinabove stated, we can consider this point only to the extent that the facts appear in the judgment-roll. As shown by the original complaint, the action was commenced against Lydia *F.* Moir. In the amended complaint, the defendant is named as Lydia *M.* Moir (sued herein as Lydia *F.* Moir). The second amended complaint begins thus: "Comes now the plaintiff and by leave of court amends his complaint herein and for cause of action against the defendant Lydia M. Moir, (who was originally sued herein as Lydia F. Moir), alleges": In her answer, appellant alleged that she has never been known as Lydia F. Moir, and that the person originally sued herein under that name is her mother. But the court found that the person sued and intended to be sued herein was and is the defendant Lydia M. Moir; that there was no substitution of one defendant for another, but that by mistake and inadvertence the middle initial of the defendant was erroneously inserted in the original complaint and summons as "F" instead of "M," and that the complaint was amended accordingly when said mistake was discovered. We have no doubt that an error of this kind may be corrected and that the action should be regarded as having been commenced against appellant at the time when the original complaint was filed. (*Allison v. Thomas,* 72 Cal. 562, [1 Am. St. Rep. 89, 14 Pac. 309].) In 15 Ann. Cas. 117, numerous cases are cited in support of the proposition that "the weight of authority seems to be that, in civil proceedings, a mistake made in the middle initial of a name by ***778** the insertion of an erroneous initial for the correct one is immaterial and should be disregarded."

Appellants next suggest that the insolvency of the bank as early as 1911 is established by the finding of the court that certain circular letters to shareholders were sent out by the general manager of the bank as alleged in the answer of appellants. But the findings of the court that certain specified allegations of the answers are untrue included the alleged facts concerning the laws of Canada, upon which appellants relied. Since these findings must be accepted as establishing the facts of the case, the only law by which the question of insolvency of the bank may be tested consists of the statutory provisions contained in the complaint. It must therefore be accepted to be true, as found by the court, that the bank did not become insolvent until ninety days after the thirtieth day of June, 1913.

(3) Finally, it is claimed that the proceedings, orders, and judgment in the insolvency matter in the supreme court of Ontario were without jurisdiction as against appellants because appellants were not served with notice of those proceedings at any place within the jurisdiction of that court. Appellants claim the benefit of the rule that jurisdiction to render a judgment personally enforceable against the defendant must be founded upon personal service of process within the state or country to which the jurisdiction of such court is confined. (*Pennoyer v. Neff,* 95 U. S. 714, [24 L. Ed. 565, see, also, Rose's U. S. Notes]; *Belcher v. Chambers,* 53 Cal. 635, and numerous other decisions.) In the cases at bar the court found that it is true that as to whatever notices, summons, processes, or pleadings mentioned in the complaints as having been served upon the defendants, such services were made upon them while they were residents of and within the state of California and not while they were residents of and actually within the Dominion of Canada.

The rule relied upon by appellants is not applicable to proceedings of the nature of those here in question. Such seems to be the effect of the decisions in which the subject has been considered. So far as we are advised, the question has not been determined by the courts of California. A leading case is Howarth v. Lombard, 175 Mass. 570, [49 L. R. A. 301, 56 N. E. 888]. That was an action brought in ***779** a court of Massachusetts by the plaintiff as receiver of a bank in the state of Washington, to recover the amount of an assessment levied by the superior court of the state of Washington upon the defendant as a stockholder. Defendant had not been personally served with process in the state of Washington in the proceedings there in which the assessment was made. The principles governing the matter of jurisdiction in such cases were extensively discussed in the Massachusetts decision and were applied to the particular case as follows: "In the case at bar a receiver of the Traders' Bank has been appointed, the amount of its assets and liabilities has been judicially determined, the necessity for an assessment upon stockholders and the amount of the required assessment have been ascertained, an assessment upon all stockholders has been made, and the receiver, who is to hold this fund in trust for creditors, has been directed to collect it. We see no injustice to the defendant in holding him here to the performance of the obligation which he voluntarily assumed in another state. The question arises, how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that, if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share, up to the amount of their subscriptions, to the trustee of this additional fund, for the benefit of creditors. The determination of the question involved is a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting ***780** under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court, so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation." (Citing cases.) "That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided."

The same subject was considered in Bernheimer v. Converse, 206 U. S. 516, [[[[51 L. Ed. 1163, 27 Sup. Ct. Rep. 755, see, also, Rose's U. S. Notes]. That was an action originating in the circuit court of the United States for the southern district of New York, wherein the receiver of a corporation of the state of Minnesota sought to recover upon the alleged stockholder's liability under the constitution and laws of the state of Minnesota. The action was based upon an order made at the instance of the receiver in the Minnesota court having jurisdiction of the receivership. This order fixed the amount of assessment declared to be necessary against each and every share of the capital stock, and authorized the receiver to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the state of Minnesota or elsewhere. Notices of hearing of the receiver's petition had been published, mailed, and served, as required by order of the court, but had not been personally served upon the stockholders who were defendants in the action brought by the receiver in the federal court. The matter having been brought before the supreme court of the United States on writ of error, that court sustained the judgment of the circuit court, and upheld the validity of the proceedings declaring the assessment. Referring to the proceeding in the action wherein the assessment***781** was made, the court said: "The proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts (Howarth v. Lombard, 175 Mass. 570, [[[[49 L. R. A. 301, 56 N. E. 888]). And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. (Hawkins v. Glenn, 131 U. S. 319, [33 L. Ed. 184, 9 Sup. Ct. Rep. 739]; Great Western Tel. Co. v. Purdy, 162 U. S. 329, 336, [40 L. Ed. 986, 990, 16 Sup. Ct. Rep. 810].)" In Converse v. Hamilton, 224 U. S. 243, [Ann. Cas. 1913D, 1292, 56 L. Ed. 749, 32 Sup. Ct. Rep.

415, see, also, Rose's U. S. Notes], referring to proceedings under the laws of the state of Minnesota wherein a court there, at the instance of the receiver, had levied an assessment against stockholders who were not made parties to the sequestration suit, and were not notified otherwise than by publication or by mail of the applications for the orders levying the assessments, the supreme court of the United States said: "The constitutional validity of chapter 272 has been sustained by the supreme court of the state, as also by this court; and this because (1) the statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which, in law or equity, he is entitled to set off against the assessment, or has any other defense personal to himself, and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made, and may not have been notified that ***782** an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts."

In *Johnson v. Libby*, 111 Me. 204, [Ann. Cas. 1916C, 681, 88 Atl. 647], it was likewise held that "when, in proceedings for the liquidation of the affairs of a corporation and for the payment of its debts and engagements an assessment is necessary to be made upon unpaid stock subscriptions and upon the additional liability which its shareholders have assumed by becoming members of the corporation as shareholders, the court may make such assessment in proceedings therefor against the corporation without the presence of or personal service upon the individual shareholders. In such proceedings the representation which a shareholder has by virtue of his membership in the corporation is all that he is entitled to."

In the cases at bar no attempt was made by either of the defendants to show that she was not a stockholder, or that she was not the holder of the alleged number of shares, or that she had any claim against the corporation which in law or equity she was entitled to set off against the assessment, or that there was any other defense personal to herself. Appellants, therefore, are not in a position to claim that they were denied any of the rights to which they might have been entitled under the most favorable construction of the law as stated in the foregoing decisions.

The judgments are affirmed.

Shaw, J., and James, J., concurred.

Cal.App. 2 Dist. 1921.
GEOFFREY TEIGNMOUTH CLARKSON, as Liquidator, etc., Respondent, v. GEORGIANA ESTHER MOIR, Appellant. GEOFFREY TEIGNMOUTH CLARKSON, as Liquidator, etc., Respondent, v. LYDIA M. MOIR, Appellant.
53 Cal.App. 775, 201 P. 474

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119 Cal.App.2d 18, 258 P.2d 1097

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Estate of GEORGE STANLEY CLELAND, Deceased.
FLORENCE CLELAND, Respondent,
v.
HELEN RAYE CLELAND, Appellant.
Civ. No. 19280.
District Court of Appeal, Second District, Division 3, California.
July 3, 1953.

HEADNOTES

(1) Judgments § 471--Effect of Foreign Judgment.
A decree of a court of State of Chihuahua in Mexico should be given only such effect as it has by the laws of that state. (Code Civ. Proc., § 1915.)

Conclusiveness as to merits of judgment of court of foreign country, notes, 46 **A.L.R.** 439; 148 **A.L.R.** 991. See, also, **Cal.Jur.,** Judgments, § 249; **Am.Jur.,** Judgments, § 530 et seq.

(2) Divorce § 304--Effect of Foreign Decree.
Where it appears from evidence that under law of State of Chihuahua in Mexico, as it existed at time husband there obtained a divorce decree from his first wife, the court granted a sort of interlocutory decree which was appealable and which, if no appeal was taken, did not become final until the court declared it executed, such decree, in the absence of such declaration, is not final, and trial court in California correctly held that husband did not obtain a divorce from his first wife and that she, following his death, is his surviving widow and therefore entitled to a family allowance from his estate.

(3) Appeal and Error § 871--Briefs--Pointing Out Errors.
It is not province of reviewing court to assume burden of searching record to ascertain whether trial judge made an erroneous ruling, or whether a party properly preserved a point in trial court, or whether he sufficiently apprised trial judge of nature and purpose of evidence he sought to introduce.

SUMMARY

APPEAL from an order of the Superior Court of Los Angeles County granting a family allowance. Joseph M. Maltby, Judge. Affirmed.

COUNSEL

Riedman & Silverberg for Appellant.

Bruce Mason and Clark Heggeness for Respondent.

VALLEE, J.
Appeal by Helen Cleland from an order granting Florence Cleland a family allowance. Whether there is any substantial evidence to support a finding that Florence Cleland is the widow of George Cleland is the question. ****19***

The material facts are these:

1. February 3, 1919-George and Florence were married in San Bernardino, California. They lived together

until April, 1931.

2. April 26, 1931-George deserted and abandoned Florence.

3. May 23, 1936-George obtained a decree of divorce from Florence in Juarez, State of Chihuahua, Republic of Mexico. The decree did not contain a formal "declaration of execution."

4. May 25, 1936-George married Helen in Mexico.

5. George and Helen lived together as man and wife until George's death.

6. January 17, 1951-George died.

The court found: the law of the State of Chihuahua required that a decree of divorce be "declared executed"; if such a decree did not contain a formal "declaration of execution" it was not a final decree; the decree obtained by George did not contain a "declaration of execution" and was not a final decree; it was and is void; except for that decree, no decree dissolving the marriage of George and Florence has been rendered or entered by any court; the marriage of George and Helen was and is void. The court concluded that Florence is the surviving widow of George.

Helen assails the findings that under the laws of Chihuahua a final decree of divorce must contain a formal "declaration of execution" and that her marriage to George was void.

Florence did not appear in the action in Chihuahua. Dr. William B. Stern, foreign law librarian of the law library of the county of Los Angeles, qualified as an expert on the laws of the State of Chuhuahua. His testimony, epitomized, was as follows:

The law of Chihuahua, at the time in question, provided: The judge, before whom the cause was heard, announced his decision, and rendered his decree; immediately after the decree was rendered it was communicated to the parties present; if a party was not present, it was posted; such communication and posting constituted service of the decree; the parties had 24 hours after such service in which to appeal; after the time for appeal had elapsed, if no appeal was taken, the court was required to declare in the decree that the divorce was executed, in order that the decree be effective; the decree did not become final until the court had declared it ***20** executed; a decree of divorce did not become executed by operation of law; the judge must have ordered it executed. The decree obtained by George recited that it was served on him personally and that it was posted. It was published as the law required. It did not and does not contain a declaration that the divorce was executed. The judge did not declare the divorce executed. The decree was not and is not final.

Section 1915 of the Code of Civil Procedure provides that "a *final* judgment of any ... tribunal of a foreign country having jurisdiction, *according to the laws of such country,* to pronounce the judgment, shall have the same effect as in the country where rendered, and also the same effect as final judgments rendered in this state." (Italics added.) (1) Under our statute the judgment of a court of a foreign country can never have any greater force than that given it by the laws of the country where pronounced, from which it derives its full force. The decree of the court of the State of Chihuahua should be given only such effect as it had by the laws of that state. (*Cf.* Gilmer v. Spitalny, 84 Cal.App.2d 39 [189 P.2d 744].)

(2) It appears from the evidence that under the law of the state of Chihuahua, as it existed at the time George obtained the decree, the court granted a sort of interlocutory decree of divorce which was appealable. There was no final decree of divorce until the court's adjudication had taken such form as to become effective as a final judgment, which did not occur until the court declared the judgment executed. The interlocutory decree was distinguished from the final decree in that it was not final or a conclusive determination of the status of the parties. The rendition of the interlocutory decree did not dissolve the marriage relation, and the parties thereto remained husband and wife until the marriage had been dissolved by a declaration, in the decree, that the divorce was executed. The evidence of Dr. Stern that we have narrated, amply supports the finding that the Chihuahua decree was not final.

Since the Chihuahua decree was not final, the trial court correctly concluded that George did not obtain a divorce from Florence and that she is his surviving widow. (*Cf.* *Estate of Pusey,* 180 Cal. 368 [181 P. 648]; *Estate of Hancock,* 156 Cal. 804 [106 P. 58, 134 Am.St.Rep. 177].)

Helen asserts the court erred in not admitting evidence to show that Florence is estopped to assert that she (Helen) is not the surviving widow of George. Counsel say, "At the ***21** time of the trial, there was an objection made to the introduction of any evidence on the ground of the pleading in the case." No reference to the record is given in support of this statement. (Rules on Appeal, rule 15 (a).) (3) It is not the province of a reviewing court to assume the vexatious burden of searching the record to ascertain whether the trial judge made an erroneous ruling, or whether a party properly preserved a point in the trial court, or whether he sufficiently apprised the trial judge of the nature and purpose of the evidence he sought to introduce. However, a cursory examination of the reporter's transcript fails to reveal that any evidence was excluded on the ground "of the pleading in the case."

Our conclusion makes it unnecessary to consider other points made by Florence in support of the order.

Affirmed.

Shinn, P. J., and Wood (Parker), J., concurred.

Appellant's petition for a hearing by the Supreme Court was denied August 27, 1953.

Cal.App.2.Dist.
In re Cleland's Estate
119 Cal.App.2d 18, 258 P.2d 1097

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9 Cal.2d 358, 70 P.2d 625, 128 A.L.R. 467

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REVEL L. ENGLISH, Respondent,
v.
MARY W. ENGLISH, etc., Appellant.
L. A. No. 14947.
Supreme Court of California
July 30, 1937.

HEADNOTES

(1) Judgments--Res Judicata--Estoppel.
An existing final judgment or decree rendered upon the merits by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal on the points and matters in issue and adjudicated in the first suit but not as to matters not in issue in the first suit.

(2) Husband and Wife--Separation Agreement--Instalment Payments--Judgments.
A separation agreement between a husband and wife providing for instalment payments is severable, each instalment representing a different obligation; and a default judgment for certain of the instalments in a suit in which the validity of the contract was not raised by the pleadings nor a direct issue does not constitute *res judicata,* estopping the defendant in a separate suit from raising the issue of fraud, coercion or duress in the execution of the contract.

See 3 **Cal. Jur. Ten-year Supp.** 644.

(3) Husband and Wife--Judgments--Default--Admissions.
The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, providing such judgment is regular and valid and shows distinctly on what count or cause of action it was rested, but the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Leon R. Yankwich, Judge. Affirmed.

The facts are stated in the opinion of the court.

COUNSEL

William Ellis Lady for Appellant.

John Perry Wood for Respondent.

THE COURT.
A hearing was granted in this case after decision by the District Court of Appeal, Third Appellate ***359** District. Upon further consideration of the cause, we are satisfied that the said court has correctly determined the same, and accordingly adopt the opinion of Mr. Justice Thompson as the opinion of this court. It reads as follows:

"This is a suit to rescind a separation contract settling property rights between the parties to this action on the ground that the agreement was procured by means of duress rendering it void. The complaint also asks for reimbursement of the sum of $2,450 which was previously paid by the plaintiff under the terms of the contract, a part of which was voluntarily paid and the balance was in satisfaction of a judgment. The material allegations of the complaint are denied. The defendant filed a cross- complaint demanding payment of other instalments amounting to the sum of $1,800 which matured subsequent to those above referred to. It is contended by the appellant that a former judgment which was previously rendered by the municipal court of Los Angeles directing the payment of certain instalments of that contract necessarily determined the validity of that instrument and therefore constitutes *res judicata* of the issues which are presented in this proceeding so as to estop the plaintiff from now asserting the invalidity of the agreement.

"The court adopted findings in this case holding that the former judgment does not constitute *res judicata;* that the contract was procured by means of coercion and duress and that it is therefore void. Judgment was rendered accordingly canceling the contract and denying the defendant the right to recover her claim under the cross-complaint for unpaid instalments which accrued later. The plaintiff's claim for reimbursement for money paid in satisfaction of previously matured instalments was also refused. The defendant's motion for a new trial was denied. From that judgment the defendant has appealed.

"The plaintiff was previously married to another woman. February 14, 1926, a decree was rendered in the jurisdiction of the Republic of Mexico purporting to divorce the plaintiff from his first wife. Assuming that this decree was valid the parties to the present action were married February 16, 1926. In an action prosecuted in the superior court of Los Angeles county by the first wife against this plaintiff a decree of divorce was rendered in her favor March 23, 1927, on the theory that the Mexican divorce was void for lack of jurisdiction. Subsequently this plaintiff brought suit in the ***360** superior court of San Bernardino county in which a decree was rendered September 21, 1928, annulling the purported marriage between the parties to this suit on the ground that the plaintiff was not an unmarried man when the marriage ceremony was performed between these parties. On numerous occasions, prior to June 14, 1928, this defendant threatened the plaintiff with criminal prosecution for bigamy and violation of the 'Mann Act' as defined by a federal statute. These threats were prompted by the relationship which existed between them pending the determination that their marriage was void. In fear of this threatened prosecution and because of the duress thus exercised the plaintiff executed an agreement with the defendant on the last-mentioned date purporting to settle their property rights, by the terms of which he promised to pay her $200 a month until the aggregate sum of $10,000 had been paid in full satisfaction of all claims on her part. March 29, 1930, this defendant was married to another man with whom she now resides as his wife.

"April 30, 1930, this defendant brought suit in the municipal court of Los Angeles based on the separation contract which is involved in this action to recover $1,750, which was then due and unpaid according to the terms of that instrument. The contract was referred to as exhibit A and made a part of the complaint. This plaintiff was duly served with process in that action and failed to appear or answer therein. His default was duly entered and judgment was rendered against him in that suit May 3, 1930, for the sum of $1,750 and costs of suit. That judgment was received in evidence on the trial of this case in support of the defense of *res judicata.* The validity of the contract was not an issue in the municipal court case. That suit was based on obligations created by a severable contract which were separate and distinct from those which are involved in this action.

"Another suit was commenced by this defendant in the municipal court of Los Angeles July 11, 1930, to recover subsequent instalments alleged to be due and unpaid. To that complaint this plaintiff filed a cross-complaint setting up the invalidity of the contract. Upon demurrer, however, that cross-complaint and answer were held to be defective. For failure to amend his pleadings the cross-complaint was dismissed and judgment was rendered against Mr. English. The issue regarding the invalidity of the contract was thus eliminated from that suit. Neither the pleadings nor the judgment ***361** in that case were offered in evidence upon this trial. It does not appear that the validity of the contract was ever determined by the court in any previous suit.

"The only question which is raised by the appellant in this action is whether the plaintiff is estopped from challenging the validity of the separation contract after voluntarily paying certain instalments thereof and after satisfying the municipal court judgment for certain other instalments amounting to $1,750 which was rendered against him by default on May 3, 1930. It is asserted the last-mentioned judgment is *res judicata* estopping the plaintiff from now challenging the validity of the contract for the reason that he had the opportunity of setting up that defense in the former action and failed to do so.

"We are of the opinion the municipal court judgment is not *res judicata* upon the issue of the validity of the contract, and that it does not estop the plaintiff from asserting in this action, which is founded on a different obligation under a severable contract, that the agreement was procured by means of duress and threats of criminal prosecution which renders it void. The contract is severable in character. Each instalment provided for therein constitutes a separate obligation payable at different designated dates.

"Regarding the application of the principle of *res judicata* it is said in 2 Freeman on Judgments, (5th ed.), page 1318, sections 626, 627:

" 'The doctrine of estoppel is not strictly applicable to a judgment. A judgment is not the act of a party; an estoppel is. ... Like the statute of limitations it is a rule of rest. ...

(1) " 'Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits by a court of competent jurisdiction upon a matter within its jurisdiction is conclusive of the rights of the parties or their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction, *on the points and matters in issue and adjudicated in the first suit.* Where a right, question or fact is distinctly put in issue and directly determined by a court of competent jurisdiction in a former suit between the same parties or their privies, the former adjudication of that fact, right or question is binding on the parties or their privies in a subsequent suit, irrespective of whether the causes of action are the same.' ***362**

(2) "Applying the text above quoted it is apparent that since the validity of the contract which is involved in this suit was not a direct issue in the former action and was not adjudicated therein, that judgment is not binding on the parties with respect to that issue in this suit which is founded entirely on different obligations arising under a severable contract.

"The appellant relies on the frequently announced principle declared in the case of Elm v. Sacramento Suburban Fruit Lands Co., 217 Cal. 223 [17 Pac. (2d) 1003], that 'judgment between the same parties is conclusive, not only as to the subject-matter in controversy in the action upon which it is based, but also in all other actions involving the same question, *and upon all matters involved in issues which might have been litigated and decided in the case'*. These cases, however, are readily distinguishable from the present cause. The cases in which that doctrine is announced were either based on contracts which are not severable or the issues which were deemed to have been determined were dependent on counterclaims or rights so closely related to the original cause of action that it was contrary to public policy to permit the causes to be severed and the parties embarrassed by repeated and endless litigation. In the Elm case, for instance, the plaintiff brought an action for specific performance of a contract to convey real property, alleging that he had fully paid the contract price therefor and demanding a deed of conveyance. The defendant admitted the contract but denied that the purchase price had been fully paid, alleging that $640 still remained unpaid thereon. On the trial of that case the plaintiff offered in evidence the entire record of a former cause between the same parties regarding the same purchase price of the property pursuant to the contract. In the former case the plaintiff sought to rescind the contract for fraud, and the defendant failed to set up his counterclaim for the unpaid balance of the purchase price. In that former case the jury returned a verdict and a judgment was rendered in favor of the plaintiff for damages for fraud in the sum of $1,940. In the subsequent case the defendant contended that he did not waive his right to recover the unpaid balance of the purchase price of the land. The trial court properly held that defendant's claim for the unpaid balance of the purchase price should have been set up in the former case as an offset ***363** to diminish the actual damages suffered by the plaintiff on account of the fraud which was held to have affected and reduced the actual consideration for which the land was purchased. On appeal from the last-mentioned judgment the Supreme Court properly held that the unpaid portion of the purchase price was a necessary part of the consideration for which the land was purchased and that the defendant was estopped from subsequently reviving that claim in another suit on the doctrine of *res judicata.* It will be observed that both of those cases involved the real value or consideration for the purchase of real property. The real issue in the case which was based on fraud being the actual market value of the land independently of the inflated value represented by the fraud and misrepresentations which induced the promise to pay the purchase price specified in the contract. Of course, the unpaid portion of the purchase price of the land was an inseparable issue in the original case as the actual value of the land and should have been pleaded as an offset in that case.

"In the present case the contract which is involved in this suit is severable. Each instalment represents a different obligation. The validity of the contract was not raised by the pleadings nor was it a direct issue in the former case. Judgment was rendered in the first case by default. Under such circumstances the parties are not estopped from raising the issue of fraud, coercion or duress in a subsequent suit upon a different obligation. It is said in 34 Corpus Juris, page 891, section 1299, in that regard:

(3) " 'The doctrine of conclusiveness of judgments applies to a judgment by default with the same validity and force as to a judgment rendered upon a trial of issues, provided such judgment is regular and valid, and shows distinctly on what count or cause of action it was rested. *But the confession implied from the default is limited to the material issuable facts which are well pleaded in the declaration or complaint, and does not apply to issues which were not raised in the pleadings.* Nor, subject to the rule that the judgment is conclusive as to every fact necessary to uphold it, is a default judgment conclusive, in a subsequent suit on a different cause of action, against any defenses defendant may have, although the same defenses, if pleaded and proved in the former action, would have defeated plaintiff's recovery, because in the absence ***364** of a trial and hearing in the first suit, it cannot be said that such matters were adjudicated therein.'

"When a contract is severable and creates separate obligations arising at different times or under different circumstances, a suit upon certain matured obligations does not estop the parties from raising other issues in another suit between the same parties involving a different obligation when such issues were neither pleaded nor directly determined by the former judgment. (*Freeman v. Barnum,* 131 Cal. 386 [63 Pac. 691, 82 Am. St. Rep. 355]; *Blumenthal v. Maryland Casualty Co.,* 119 Cal. App. 563 [6 Pac. (2d) 965]; *Nielsen v. Emerson,* 121 Cal. App. 415 [9 Pac. (2d) 260].) It is said in that regard in 34 Corpus Juris, page 839, sections 1248, 1249:

" 'As a general rule a contract to do several things at different times is divisible in its nature, so as to authorize successive actions; and a judgment recovered for a single breach of a continuing contract or covenant is no bar to a suit for a subsequent breach thereof. ...

" 'Where money is payable by instalments, a distinct cause of action arises upon the falling due of each instalment, and they may be recovered in successive actions, no judgment in the series of actions operating as a bar to the recovery of any instalment not due at its rendition.'

"It should be recalled that when an issue is actually and directly raised and determined in a former suit between the same parties based upon severable matured instalments of the same contract, the judgment will estop them from again raising that same issue in another suit, even though it is based on instalments which have subsequently matured. It is said in 2 Freeman on Judgments, (2d ed.), page 1649, section 774:

" 'Where the validity of a contract is in issue, all possible defenses then existing must be interposed or they will become *res judicata* by a judgment enforcing the contract and cannot be interposed in a subsequent action based on the same contract. *An adjudication* of the defense of fraud, made in an action on one instalment of a contract, is conclusive in another action on a second instalment of the same contract.'

"But the learned author of that text, in the volume last cited, at page 1687, section 795, makes it very clear that this rule does not apply to such severable contracts when the issue ***365** of fraud was neither pleaded nor determined in the first action. He says:

" 'The recovery of the purchase price by the seller, either of goods or land, does not bar a subsequent action by the purchaser for damages from fraud in making the sale unless in the former action the fraud was actually put in issue and adjudicated. And a decree foreclosing a mortgage securing a purchase money note, does not prevent the maintenance of an action for damages for fraud in the sale. *A default judgment on a contract to pay royalties does not adjudicate fraud in inducing the contracts, which may therefore be urged as a defense in a subsequent action on the same contract for additional royalties.'*

"Likewise, it is said in 2 Black on Judgments, (2d ed.), page 941, section 617:

" 'So a judgment by default upon one of several notes founded upon one and the same illegal consideration, *no issue upon the fact of consideration being tendered by the complaint,* does not estop the defendant from setting up in a second action, upon another of such notes, the defense of illegality of consideration.'

"In the same section last cited it is further said:

" 'So again, a judgment in a suit for interest (as on a bond), particularly when evidenced by a distinct obligation (as a coupon), is not *res judicata* as to the principal contract, unless, in such suit, the validity of the original contract itself was adjudicated upon. ... And the recovery of judgment for taxes provided for by an unconstitutional act, in an action in which the validity of the statute is not questioned, does not estop the successful party from alleging, in a subsequent suit between the same parties upon a different cause of action, that the act is unconstitutional.'

"Based on the preceding authorities and on principle we conclude that the default judgment which was rendered in the municipal court action based upon certain matured instalments of the separation contract, wherein the issue of fraud, coercion and duress in procuring the execution of the agreement were neither pleaded nor determined, is not *res judicata* in this proceeding and does not estop the plaintiff from maintaining this suit to cancel the contract as to all instalments which accrued subsequently thereto. The findings and judgment canceling the contract for fraud, coercion and duress, and denying the defendant the right to recover upon her ***366** cross-complaint the unpaid instalments, are adequately supported by the evidence and the law."

The judgment is affirmed.

Rehearing denied.

Cal.
English v. English
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7 Cal.App.4th 1375, 10 Cal.Rptr.2d 1

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FOUR STAR ELECTRIC, INC., Plaintiff and Appellant,
v.
F & H CONSTRUCTION, Defendant and Respondent.
No. C009168.
Court of Appeal, Third District, California.
Jul 8, 1992.

SUMMARY

The trial court, in an action by a subcontractor against a contractor for compensation, sustained the contractor's demurrer on the ground the action was precluded by the collateral estoppel effect of default judgments for indemnification in favor of the contractor against the subcontractor, based on allegations by the contractor in a prior action that it had complied with the subcontract in its entirety and paid the subcontractor all moneys due under the subcontract. A judgment of dismissal was entered. (Superior Court of Sacramento County, No. 512708, Joe S. Gray, Judge.)

The Court of Appeal reversed with directions. The court held that it was unnecessary to the default judgments that the contractor alleged the underlying contract had been performed in its entirety, i.e., that the contractor owed no indebtedness to the subcontractor which would act as a setoff against the request for indemnification, since setoff was a defense which the indemnitor must plead and prove. Thus, because the underlying complaints for indemnification did not have to anticipate and negate a defense of setoff, the allegation of complete performance was not material to the complaint for indemnification, and the default judgments were thus not entitled to collateral estoppel effect in the subcontractor's action for compensation for work performed after the default judgments. (Opinion by Scotland, Acting P. J., with Nicholson and Raye, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Pleading § 21--Demurrer to Complaint--Function.
Ordinarily, a demurrer tests the sufficiency of the complaint alone and not the evidence or other extrinsic matters. However, a complaint may be read as if it included matters judicially noticed, and such matters may show the complaint fails to state a cause of action though its bare allegations do not disclose the defect.

[See 5 **Witkin,** Cal. Procedure (3d ed. 1985) § 896.]

(2) Judgments § 81--Res Judicata--Collateral Estoppel--Prerequisites.
Collateral estoppel precludes parties from litigating an issue previously determined in another cause of action between them or their privities. As a prerequisite for asserting the doctrine, it must be shown that the issue was litigated and decided in the prior action. A second prerequisite is that the issue must have been necessary to the prior judgment.

(3) Judgments § 91--Res Judicata--Collateral Estoppel--Judgment by Default.
The doctrine of collateral estoppel may be applied based on a prior default judgment. A default judgment conclusively establishes, between the parties so far as subsequent proceedings in a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment. However, such a judgment is not conclusive as to any defense or issue that was not raised and is not necessary to uphold the judgment.

(4a , 4b, 4c) Judgments § 91--Res Judicata--Collateral Estoppel-- Judgment by Default--Indemnity.
In an action by a subcontractor against a contractor for compensation, the trial court erred in sustaining the contractor's demurrer on the ground the action was precluded by the collateral estoppel effect of default judgments in indemnification actions by the contractor against the subcontractor. The contractor had alleged in the prior action that it had complied with the subcontract in its entirety and paid the subcontractor all moneys due under the subcontract. It was unnecessary to the default judgments that the contractor alleged the underlying contract had been performed in its entirety, i.e., that the contractor owed no indebtedness to the subcontractor which would act as a setoff against the request for indemnification, since setoff was a defense which the indemnitor must plead and prove. Thus, because the underlying complaints for indemnification did not have to anticipate and negate a defense of setoff, the allegation of complete performance was not material to the complaint for indemnification, and the default judgments were not entitled to collateral estoppel effect in the subcontractor's action for compensation for work performed after the default judgments.

[See **Cal.Jur.3d,** Contribution and Indemnification, § 69; 5 **Witkin,** Cal. Procedure (3d ed. 1985) Pleading, § 1004.]

(5) Contribution and Indemnification § 13--Indemnity--Pleading--Complaint.
An indemnitee seeking to recover on an agreement for indemnification must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract that gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained.

[See **Cal.Jur.3d,** Contribution and Indemnification, § 65; 4 **Witkin,** Cal. Procedure (3d ed. 1985) Pleading, §§ 479-482.]

(6) Pleading § 18--Complaint--Anticipating Defenses.
Allegations of a complaint that anticipate or negate new matter are superfluous. The only allegations essential to a complaint are those required in stating the cause of action, and allegations inserted for the purpose of intercepting and cutting off a defense are superfluous and immaterial. The matter pleaded may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call on the defendant to answer it.

[See 4 **Witkin,** Cal. Procedure (3d ed. 1985) Pleading, § 374.]

(7) Cross-Complaints and Setoffs § 10--Cross-complaints--Effect.
An action by a subcontractor against a contractor for moneys due under the subcontract was not barred by the subcontractor's failure to file cross-complaints in the contractor's previous action against it for indemnity. Under Code Civ. Proc., § 426.30, subd. (b)(2), a subsequent complaint is not barred where the person who failed to plead the related cause of action did not file an answer to the complaint against him or her, and the contractor had obtained default judgments in the prior action against the subcontractor.

COUNSEL

Howard M. Hoffman for Plaintiff and Appellant.

Macey & Macey and Richard E. Macey for Defendant and Respondent.

SCOTLAND, Acting P. J.
In June 1987, the California Department of Corrections (CDC) contracted with F & H Construction (F & H) for a construction project at CDC's Jamestown facility. In October of that year, ***1378** F & H subcontracted with Four Star Electric, Inc. (Four Star) for electrical work on the prison project.

The subcontract contained an indemnification clause which provided in pertinent part: "The Sub-Contractor ... agrees to protect and fully indemnify the Owner and Contractor against all liability for claims and liens for labor, materials, equipment and supplies, including attorneys fees, resulting therefrom which may accrue from labor employed by, or materials, equipment and supplies ordered by the Sub-Contractor."

Four Star failed to pay three of its suppliers, who then filed stop notices with CDC and filed superior court actions against both Four Star and F & H.[FN1] In each supplier's action, F & H cross-complained against Four Star for indemnification. The cross-complaints alleged that F & H "has complied with all the terms, covenants and conditions of its Subcontractor with [Four Star] and has paid [Four Star] any and all monies due [Four Star] on account of any work, labor or material supplied by [Four Star] in accordance with the Contract between [F & H] and [Four Star]."

FN1 In those actions, Brown Wholesale Electric Company sought $73,320.84 plus interest, fees and costs; Union Line Construction, Inc., sought $29,248.41 plus interest, fees and costs; and Capital Wholesale Electric Company, Inc., sought $43,370.21 plus interest, fees and costs.

Four Star did not defend itself, and F & H obtained a default judgment in each case.

In February 1990, Four Star filed the action which is now before us. The complaint alleged that Four Star had fully performed the subcontract but that F & H had paid only a portion of the compensation called for by the subcontract.[FN2] F & H demurred, claiming the action is precluded by the collateral estoppel effect of the default judgments in the aforesaid indemnification actions wherein F & H alleged it had complied with the subcontract *in its entirety* and had paid Four Star *all monies* due under the subcontract.

FN2 The complaint did not identify any particular work for which F & H had not paid Four Star. On appeal, Four Star contends the unpaid portion of the contract involves "breach of contract, modifications, extra work and change orders," and does not involve the suppliers who had filed the prior actions.

The trial court agreed, sustaining the demurrer on the ground "the Complaint does not state facts sufficient to constitute a cause of action in that the material issues alleged in the Complaint of Plaintiff have been determined in previous legal proceedings between the parties hereto adverse to Plaintiff resulting in Judgments in favor of Defendant and as such are Res Judicata." A judgment of dismissal was entered.

On appeal, Four Star contends the allegations that F & H fully performed the subcontract are not entitled to collateral estoppel effect because they ***1379** were neither material nor necessary to the indemnification judgments. We agree and reverse the judgment of dismissal.

As we shall explain, an indemnitee seeking to recover on an agreement for indemnification must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract which gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained. The indemnitee need not allege the underlying contract had been performed *in its entirety,* i.e., that the indemnitee owed no indebtedness to the indemnitor which would act as a setoff against the request for indemnification, because setoff is a *defense* which the *indemnitor* must plead and prove.

Since its cross-complaints for indemnification did not have to anticipate and negate a defense of setoff, F & H's allegation that it had performed the subcontract in its entirety and had paid Four Star all monies due under the subcontract was surplusage. Hence, the allegation was not material to the cross-complaint for indemnification and was not entitled to collateral estoppel effect.

Discussion

(1) Ordinarily, a demurrer tests the sufficiency of the complaint alone and not the evidence or other extrinsic matters. "However, a complaint may be read as if it included matters judicially noticed. (Code Civ. Proc., § 430.30, subd. (a); see 5 Witkin, Cal. Procedure [(3d ed. 1985) Pleading], § 896, p. 337.) Such matters may show the complaint fails to state a cause of action though its bare allegations do not disclose the defect." (*Lazzarone v. Bank of America* (1986) 181 Cal.App.3d 581, 590 [226 Cal.Rptr. 855].)

Here, F & H requested the trial court to take judicial notice of pertinent portions of court files in the prior actions. The trial court was required to do so upon request (Evid. Code, §§ 452, subd. (d), 453), and we must do likewise on appeal. (Evid. Code, § 459, subd. (a)(1); *Lazzarone, supra,* 181 Cal.App.3d at p. 590). If the collateral estoppel bar appears on the face of the documents judicially noticed, the defense is properly considered in reviewing the demurrer. (Code Civ. Proc., § 430.30; *Lazzarone, supra,* at p. 590.)

(2) "Collateral estoppel precludes parties from litigating an issue previously determined in another cause of action between them or their privities. As a prerequisite for asserting this doctrine, it must be shown that the issue was, in fact, litigated and decided in the prior action." (*Hulsey v. Koehler* (1990) 218 Cal.App.3d 1150, 1156 [267 Cal.Rptr. 523], citations omitted.) A ***1380** second prerequisite is that the issue must have been necessary to the prior judgment. (Code Civ. Proc., § 1911; *Stanson v. Mott* (1976) 17 Cal.3d 206, 213 [130 Cal.Rptr. 697, 551 P.2d 1]; *Albertson v. Raboff* (1956) 46 Cal.2d 375, 384-385 [295 P.2d 405]; *Bronco Wine Co. v. Frank A. Logoluso Farms* (1989) 214 Cal.App.3d 699, 712 [262 Cal.Rptr. 899]; *In re Marriage of Rabkin* (1986) 179 Cal.App.3d 1071, 1082-1083 [225 Cal.Rptr. 219]; 7 Witkin, Cal. Procedure (3d ed. 1985) Judgment, § 268, pp. 710-711.) For example, a trial court's finding that parties intended to create a valid lien was unnecessary to its decision that the writing was insufficient to create a lien; thus, the finding regarding the parties' intent and understanding did not preclude a later proceeding alleging that the lien had not been asserted in good faith. (*Albertson, supra,* at pp. 384-385.)

(3) Four Star does not challenge the general principle that the doctrine of collateral estoppel may be applied based upon a prior default judgment. (See, e.g., *English v. English* (1937) 9 Cal.2d 358, 363-364 [70 P.2d 625, 128 A.L.R. 467]; *Brown v. Brown* (1915) 170 Cal. 1, 5 [147 P. 1168]; *Mitchell v. Jones* (1959) 172 Cal.App.2d 580, 586- 587 [147 P. 1168]; *O'Brien v. Appling* (1955) 133 Cal.App.2d 40, 42 [283 P.2d 289].) "[A] default judgment conclusively establishes, between the parties so far as subsequent proceedings on a different cause of action are concerned, the truth of all material allegations contained in the complaint in the first action, and every fact necessary to uphold the default judgment; but such judgment is not conclusive as to any defense or issue which was not raised and is not necessary to uphold the judgment." (*Mitchell, supra,* at pp. 586-587.)

(4a) Rather, Four Star argues the three default judgments entered against it should not be given collateral estoppel effect because the allegations that F & H had paid Four Star "any and all monies due" under the subcontract were not "material allegations" of the cross-complaints for indemnification and, thus, were not necessary to the default judgments. (*Mitchell, supra,* 172 Cal.App.2d at pp. 586-587.) We agree.

(5) An indemnitee seeking to recover on an agreement for indemnification must allege the parties' contractual relationship, the indemnitee's performance of that portion of the contract which gives rise to the indemnification claim, the facts showing a loss within the meaning of the parties' indemnification agreement, and the amount of damages sustained. (*Piggly Wiggly Yuma Co. v. Indemnity Co.* (1931) 116 Cal.App. 541, 544 [3 P.2d 15]; Civ. Code, § 1439; Code Civ. Proc., § 457; 4 Witkin, Cal. Procedure (3d ed. 1985) Pleading, §§ 479-482, pp. 515-519; 14 Cal.Jur.3d, Contribution and Indemnification, § 65, p. 727.)

(4b) To show the parties' contractual relationship, F & H appended the subcontract to its cross-complaints for indemnification and alleged in substance that it had performed the subcontract to the extent it paid Four Star ***1381** sufficient funds to pay the suppliers.[FN3] To show a loss within the meaning of the indemnification agreement, F & H alleged that Four Star failed to compensate the suppliers and, as a consequence, the suppliers filed stop notices requiring CDC to withhold funds from F & H and to pay the suppliers directly. Because F & H would not be paid by CDC, F & H was entitled to reimbursement of the funds it had paid to Four Star. The cross-complaints' allegations were "material" and "necessary to uphold the judgment" to the extent they established these facts.

FN3 F & H did not allege explicitly that it paid Four Star sufficient funds to pay the suppliers. Rather, F & H alleged it "has complied with all the terms, covenants and conditions of its Subcontract with [Four Star] and has paid [Four Star] any and all monies due [Four Star] on account of any work, labor or material supplied by [Four Star] in accordance with the Contract ...." This necessarily includes an allegation that F & H paid Four Star sufficient funds to pay the suppliers. (Civ. Code, §§ 3536, 3537 [the greater contains the less; superfluity does not vitiate].)

However, the pleadings went beyond this by alleging that F & H paid Four Star *all* sums due to Four Star under the subcontract, which would include the monies presently at issue (monies assertedly owed by F & H for subcontract work performed *after* the indemnification action). Claiming this greater allegation was necessary for the default judgments, F & H asserts it "could not have obtained a judgment in any of the three cases referred to herein if it owed any monies to [Four Star] ...." "[T]here is no way ... that the three Superior Courts that granted a judgment to [F & H] could have awarded [F & H] a judgment without making a determination that between [Four Star] and [F & H] there were no monies owed from [F & H] to [Four Star] but only from [Four Star] to [F & H]. Any monies awarded [F & H] would have had to have been in excess of any monies owed by [F & H] to [Four Star] ...." F & H is wrong.

A concurrent indebtedness or setoff is a "new matter constituting a defense" (i.e., an affirmative defense) which the indemnitor, Four Star, would be obligated to plead in an answer to the cross-complaint for indemnification and prove at trial. (Cf. Temple St. Cable Ry. v. Hellman (1894) 103 Cal. 634, 639 [37 P. 530]; see Interstate Group Administrators, Inc. v. Cravens, Dargan & Co. (1985) 174 Cal.App.3d 700, 706 [220 Cal.Rptr. 250]; Space Properties, Inc. v. Tool Research Co. (1962) 203 Cal.App.2d 819, 827 [22 Cal.Rptr. 166]; 5 Witkin, Cal. Procedure, *op. cit. supra,* Pleading, § 1004, at pp. 425-426; 14 Cal.Jur.3d, § 69, p. 734; Code Civ. Proc., § 431.30, subd. (b)(2).) Because the existence of a concurrent indebtedness would not deny the "truth of all the essential allegations of the complaint which show a cause of action, but [is a fact] from which it results that, notwithstanding the truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the action was brought, [the concurrent indebtedness would be] new matter." (Goddard v. Fulton (1863) 21 Cal. 430, 436.) ***1382**

(6) It is well settled that allegations of a complaint which anticipate or negate new matter are superfluous. "The only allegations essential to a complaint are those required in stating the cause of action, and allegations inserted for the purpose of intercepting and cutting off a defense are superfluous and immaterial. The matter alleged may be material in the case, but immaterial in the complaint, and a plaintiff cannot by pleading such matter at the outset call upon the defendant to answer it." (Canfield v. Tobias (1863) 21 Cal. 349, 350; 4 Witkin, Cal. Procedure, *op. cit. supra,* Pleading, § 374, p. 426.)

(4c) To the extent it established Four Star's indebtedness to F & H, the allegation that F & H paid Four Star "any and all monies due" was material and necessary to the cross-complaints for indemnification. However, to the extent it anticipated and negated a possible defense of setoff by alleging, in effect, that F & H had paid all sums due on the subcontract and thus had no concurrent indebtedness to Four Star, the allegation was immaterial and not entitled to collateral estoppel effect. (Mitchell, *supra*, 172 Cal.App.2d at pp. 586-587.)

F & H's contention that it was required to allege full performance of its part of the subcontract finds no support in the language of the indemnification clause which requires Four Star to indemnify F & H for any liabilities which "accrue" during the life of the agreement. The contractual language indicates the indemnity obligation was ongoing and could be asserted as such obligations arise, not just at the conclusion of the contract. Thus, the indemnification agreement did not require F & H to allege in its cross-complaint in each supplier's action that F & H had fully performed the subcontract.

Our conclusion comports with the practical realities of this case. The suppliers' actions purportedly arose during Four Star's performance of the subcontract before the full scope of its work, including any requested modifications and change orders, could be determined. As a practical matter, Four Star rationally could have concluded that it had no defense to the suppliers' actions and F & H's cross-actions and that Four Star's most economical course would be to permit default judgments to be entered against it. If, however, the default judgments were to collaterally estop Four Star from seeking compensation for other work yet to be performed, Four Star would be compelled to appear in each action and cross-action in order to preserve rights having nothing whatsoever to do with those actions. The result, an increase rather than a decrease in litigation, is precisely what the doctrine of res judicata seeks to avoid. (See gen. 7 Witkin, Cal. Procedure, *op. cit. supra,* Judgment, § 188, pp. 621-622, and cases cited therein.) ***1383**

(7) F & H retorts that, if it was Four Star's burden to assert a claim for monies owed by F & H, Four Star should have done so by cross- complaints in the suppliers' actions rather than by bringing the instant action for breach of contract. F & H relies on Code of Civil Procedure former sections 438 and 439 which provided that a defendant who fails to assert a counterclaim arising out of the transaction set forth in the complaint may not thereafter maintain an action on that claim. (Stats. 1941, ch. 454, § 2, p. 1751.) F & H's reliance on former sections 438 and 439 is misplaced, because they were repealed in 1971. (Stats. 1971, ch. 244, §§ 41, 42, p. 389.) The current statute on compulsory cross- complaints provides that a subsequent complaint is not barred where, as here, "[t]he person who failed to plead the related cause of action did not file an

answer to the complaint against him." (Code Civ. Proc., § 426.30, subd. (b)(2).) Accordingly, Four Star's defaults did not preclude it from bringing the present action.

In sum, Four Star's action is not barred by collateral estoppel, and the trial court erroneously sustained F & H's demurrer which so asserted. On remand, the trial court shall have an opportunity to rule on F & H's special demurrer to Four Star's first cause of action on the ground of uncertainty.

Disposition

The judgment (order of dismissal) is reversed. The trial court is directed to vacate its order sustaining F & H's general demurrer without leave to amend and to issue a new order overruling that demurrer. Four Star is awarded its costs on appeal.

Nicholson, J., and Raye, J., concurred.

A petition for a rehearing was denied August 4, 1992, and the opinion was modified to read as printed above. Respondent's petition for review by the Supreme Court was denied October 16, 1992. ***1384**

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